

## Maurer School of Law: Indiana University Digital Repository @ Maurer Law

---

Articles by Maurer Faculty

Faculty Scholarship

---

2015

# When the Bough Breaks: The U.S. Tax Court's Branch Difficulties

Leandra Lederman

Follow this and additional works at: <https://www.repository.law.indiana.edu/facpub>

 Part of the [Courts Commons](#), and the [Tax Law Commons](#)

Several cases have challenged the validity of regulation section 1.36B-2(a)(1), which extends the ACA's premium assistance credit to persons enrolled in federal exchanges set up in states which declined to establish medical insurance exchanges. The courts typically have held that the governmental and private plaintiffs have standing.

Even though part of their motivation is ideological, the plaintiffs face additional expenses under the ACA, which suffices to establish standing. *E.g.*, *Halbig v. Burwell*, 758 F.3d 390 (D.C. Cir. 2014); see also *King v. Burwell*, 759 F.3d 358 (4th Cir. 2014); *Oklahoma ex rel. Pruitt v. Burwell*, 2014 WL 4854543 (E.D. Okla. Sept. 30, 2014).

## Conclusion

Standing issues are not the “meat and potatoes” of federal tax litigation. However, they are of growing importance. The able tax attorney should have at least working knowledge of the intricacies of standing doctrine. ■

# When the Bough Breaks: The U.S. Tax Court's Branch Difficulties

By Leandra Lederman\*

A 2014 opinion issued by the Court of Appeals for the D.C. Circuit brought to the fore a fundamental unanswered question: in which branch of government is the U.S. Tax Court located? In 1969, Congress transformed the former agency into a “court of record” under “article I of the Constitution.” I.R.C. § 7441. However, Congress did not specify which branch would house the court.

In *Kuretski v. Commissioner*, 755 F.3d 929 (D.C. Cir. 2014), the case that renewed interest in this question, the taxpayers argued that the President's right to remove a Tax Court judge raises a separation of powers problem because the Tax Court is located in the judicial branch or, alternatively, in the legislative branch, *id.* at 932. The D.C. Circuit rejected the taxpayers' assertions, finding instead that the Tax Court “exercises its authority as part of the Executive Branch.” *Id.* at 943.

Was the D.C. Circuit correct? The law in this area is so uncertain that, barring Supreme Court review, it is hard to know. A 1969 Senate Report states that Congress intended to cease having “one executive agency . . . sitting in judgment on the determinations of another executive agency” and that it was therefore making “the Tax Court an Article I court rather than an executive

agency.” S. REP. NO. 91-552, at 303 (1969). This language could mean that Congress intended to move the Tax Court out of the executive branch. However, another possible reading is that Congress intended only to transform the Tax Court into a court—so it would no longer be an agency overseeing another agency. The Supreme Court in *Freytag v. Commissioner*, 501 U.S. 868, 890 (1991), quoted the Senate Report language in the context of an Appointments Clause challenge to the selection of the Tax Court's Special Trial Judges. Although the four concurring justices argued that “the Tax Court is a free-standing, self-contained entity in the Executive Branch,” *id.* at 915 (Scalia, J., concurring), the five-justice majority reached the narrower holding that “[t]he Tax Court is not a ‘Department’” within the executive branch, *id.* at 888. It found that the Tax Court is a “Court of Law” within the meaning of the Appointments Clause and that it exercises the “judicial power of the United States,” *id.* at 889–90, but it did not indicate in which branch the court is located.

Perhaps, as the *Freytag* concurrence argued, Congress never removed the Tax Court from the executive branch. See Robin J. Arz, *Recommendations for a New Independent Adjudication Agency To Make the Final Administrative Adjudications of Social Security Act*

*Benefits Claims*, 23 J. NAT'L ASS'N ADMIN. L. JUDGES 267, 330–31 (2003) (asserting that “[t]he U.S. Tax Court was . . . an Executive Branch Article II court until it was converted into an Article I Executive Branch court in 1969”). The Tax Reform Act of 1969 states in an off-Code provision that “[t]he United States Tax Court established under the amendment . . . is a continuation of the Tax Court of the United States as it existed prior to the date of the enactment of this Act . . . .” Pub. L. No. 91-172, § 961, 83 Stat. 487, 735 (1969). A court decision just before *Freytag* relied on that statement to hold that the Tax Court was “a department associated with the Executive Branch.” *Samuels, Kramer & Co. v. Commissioner*, 930 F.2d 975, 994 (2d Cir. 1991). Additionally, a nontax decision interpreted *Freytag* to mean that the Tax Court is a court of law “despite being part of the Executive Branch.” *S.C. State Ports Auth. v. FMC*, 243 F.3d 165, 171 (4th Cir. 2001), *aff'd*, 535 U.S. 743 (2002).

If Congress did in fact remove the Tax Court from the executive branch in 1969, where did Congress place the court? Some have stated that the Tax Court is located in the judicial branch. See, e.g., *Harpole v. United States*, No. A00-176CV (HRH), 2000 U.S. Dist. LEXIS 17697, at \*8 (D. Alaska Nov. 3, 2000) (“The Tax Court is . . . independent of the executive and legislative branches . . . and is considered part of the judicial branch of the government.”); J. MARTIN BURKE & MICHAEL K. FRIEL, *UNDERSTANDING FEDERAL INCOME TAXATION* § 1.02 (4th ed. 2013) (“The 1969 Act renamed the court the

\* William W. Oliver Professor of Tax Law, Indiana University Maurer School of Law, Bloomington, IN.

'United States Tax Court' and gave it 'constitutional status' under Article 1, Section 8, Clause 9 of the Constitution, so that it is now part of the judicial branch.").

Can the judicial branch encompass courts that lack Article III protections? *Miller v. French*, 530 U.S. 327, 341 (2000), observed, "The powers of the Judicial Branch are set forth in Article III, § 1, which [contemplates one Supreme Court and inferior courts] . . . and provides that these federal courts shall be staffed by judges who hold office during good behavior . . . ." Moreover, the Federal Judicial Center's website states, "Some federal courts and adjudicative bodies are not part of the judicial branch. These courts are served by judges who do not have the Article III protections." That website lists the Tax Court among the adjudicative bodies housed outside the judicial branch. See Fed. Judicial Ctr., *Federal Courts Outside the Judicial Branch*, [http://www.fjc.gov/history/home.nsf/page/courts\\_special\\_fcotj.html](http://www.fjc.gov/history/home.nsf/page/courts_special_fcotj.html). Yet USA.gov, "the U.S. government's official web portal," lists the Tax Court as a "Special Court" within the judicial branch. See *Federal Judicial Branch*, <http://www.usa.gov/Agencies/Federal/Judicial.shtml>. Similarly, the *United States Government Manual* currently includes the description of the Tax Court within the Judicial Branch/Special Courts section. See OFFICE OF THE FED. REGISTER, NAT'L ARCHIVES & RECORDS ADMIN., THE UNITED STATES GOVERNMENT MANUAL 71 (2013), available at <http://www.gpo.gov/fdsys/pkg/GOVMAN-2013-11-06/pdf/GOVMAN-2013-11-06.pdf>.

The federal government has been disturbingly inconsistent on the question of which branch the Tax Court is in. The Office of Management and Budget (OMB) locates the Tax Court in the legislative branch. BUDGET ANALYSIS BRANCH, OFFICE OF MGMT. & BUDGET, PUBLIC BUDGET DATABASE USER'S GUIDE 10 tbl.1 (2014), available at <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2015/assets/>

db\_guide.pdf. Both the annual *United States Government Manual* and the government's "Plum Book" on the legislative and executive branches, published every four years, placed the Tax Court in the legislative branch, but only until about 2008. Compare COMM. ON HOMELAND SEC. & GOV'T AFFAIRS, U.S. SENATE, POLICY AND SUPPORTING POSITIONS 2 (2008), available at <http://www.gpoaccess.gov/plumbbook/2008/index.html> ("Plum Book" listing the Tax Court in the legislative branch), and OFFICE OF THE FED. REGISTER, NAT'L ARCHIVES & RECORDS ADMIN., THE UNITED STATES GOVERNMENT MANUAL 76 (2008–09), available at <http://www.gpo.gov/fdsys/pkg/GOVMAN-2008-06-01/pdf/GOVMAN-2008-06-01.pdf> (referring to the Tax Court as an "independent judicial body in the legislative branch"), with COMM. ON OVERSIGHT & GOV'T REFORM, U.S. HOUSE OF REPRESENTATIVES, POLICY AND SUPPORTING POSITIONS (2012), available at <http://www.gpo.gov/fdsys/pkg/GPO-PLUMBOOK-2012/content-detail.html> (not listing the Tax Court at all), and OFFICE OF THE FED. REGISTER, NAT'L ARCHIVES & RECORDS ADMIN., THE UNITED STATES GOVERNMENT MANUAL 73 (2009–10), available at <http://www.gpo.gov/fdsys/pkg/GOVMAN-2009-09-15/pdf/GOVMAN-2009-09-15.pdf> (including the description of the Tax Court within the Judicial Branch/Special Courts section, as in 2013).

Could the OMB be correct that the Tax Court is in the legislative branch? The 1969 law "establishe[d] the Tax Court as a court under Article I of the constitution, dealing with the Legislative Branch." S. REP. NO. 91-552, at 304 (1969). Perhaps this law located the Tax Court in that branch. See, e.g., *Ostheimer v. Chumbley*, 498 F. Supp. 890, 892 (D. Mont. 1980) ("[T]he Tax Court . . . became a part of the legislative branch of government in 1969."), *aff'd without op.*, 746 F.2d 1487 (9th Cir. 1984); Theodore Tannenwald, Jr., *The United States Tax Court: Yesterday, Today, and Tomorrow*, 15 AM. J. TAX POL'Y 1 (1998) ("The Tax Reform Act of 1969

. . . made the Court a legislative court, thus technically part of the Legislative Branch of Government, although clearly recognized as a judicial body."). Of course, it is possible to interpret the Senate Report's statement as referring only to the power used to create the court, not the court's location.

If none of the conflicting statements above is completely satisfying, could the Tax Court be located outside the three branches? There is a debate over whether independent agencies comprise an unenumerated "fourth branch." See, e.g., Richard J. Pierce, Jr., *The Role of Constitutional and Political Theory in Administrative Law*, 64 TEX. L. REV. 469, 510 (1985) ("*Humphrey's Executor* simultaneously spawned the concept of an 'independent agency,' which Congress values so highly, and the concept of a headless fourth branch of government, which jurists and scholars frequently decry."); Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 578 (1984) ("[E]xperience has accustomed lawyers and judges to accepting the independent regulatory commissions . . . as a 'headless "fourth branch"' of government."). The Tax Court is no longer an independent agency but perhaps it nonetheless lies in that lacuna. Cf. Strauss, *supra*, at 574 (mentioning the issue of special adjudicative tribunals, including Article I courts).

Ultimately, all of this analysis—and the federal government's inconsistent categorization of the court—highlight the current lack of a concrete answer to the branch question. Meanwhile, the Tax Court's unclear position makes it unusually unaccountable and insular. See Leandra Lederman, *Tax Appeal: A Proposal to Make the U.S. Tax Court More Judicial*, 85 WASH. U. L. REV. 1195, 1213 (2008). The Tax Court should be unambiguously located somewhere, to resolve these issues and avoid further constitutional challenges like the one in *Kuretski*. ■